IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 863 of 1983
WITH
CIVIL REVISION APPLICATION NO 950 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Nos. 1 and 3 to 5 No. No.2 Yes.

DADABHAI DOSABHAI GAYWALA

Versus

SAVITABEN D/O MAGANLAL NATHUBHAI

Appearance:

MS KJ BRAHMBHATT for Petitioner

MR SN SHELAT for Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 28/07/98

COMMON ORAL JUDGEMENT

These two revisions arising out of the same judgment and decree of the lower Appellate Court are proposed to be disposed of by common judgment.

Rent revision No.950 of 1983 has been filed by three persons who were alleged by the landlord to be

subtenants of the tenant in chief. Revision No.863 of 1983 has been filed by the tenant in chief defendant No.1.

Brief facts giving rise to this revision are as folows :

In the year 1961, under rent note, the disputed accommodation consisting of ground floor and first floor was let out to the defendant No.1 on monthly rent of Rs.40/-. The defendant No.1 was in arrears of rent exceeding six months. Hence, notice of demand dated 7.11.1996 was issued. Notice was served but it was not complied with. It was alleged that defendant No.1 had illegally sublet, assigned or transferred part of the suit premises viz., first floor to the defendants No. 2 to 4. Another allegation was that the defendant No.1 has given part of the premises on licence with monetary consideration to defendants No. 2, 3 and 4. He was charging rent in excess of standard rent from the defendants No. 2, 3 and 4. It was further alleged that the defendants No. 2 to 4 have constructed bathroom and chokdi on the first floor of the suit premises which amounts to construction of permanent nature without written consent of the landlord. It was further alleged that premises was let out to the defendant No.1 for residential purposes but has changed its user wherein the defendant No.4, has started using part of the accommodation for his business purposes in electrical goods. Accordingly, the suit for eviction was filed.

The tenant in chief defendant No.1 had resisted the suit denying these allegations and pleaded that defendants No. 2, 3 and 4 were not subtenants but licensees. Other allegations were specifically denied by the defendant No.1. The defendants No. 2, 3 and 4 contested the suit through their separate written statements. Defendants No. 2 and 3 in their written statement pleaded that they were residing with the defendant No.1 as his relatives and licensees and were not paying any money or rent to the defendant No.1. They changed their stand by filing second written statement in which they pleaded that they are direct tenants of the first floor and they are jont tenants of the suit premises since 1961. It was further pleaded that previous landlord had accepted rent from them and as such they are joint tenants.

The defendant No.4 resisted the suit on the ground that he is also joint tenant along with the defendants No. 1, 2 and 3 for the last 20 years within knowledge of the previous landlord. It was also pleaded

that the suit is bad for want of notice to defendants No. 2 to 4.

The Trial Court decreed the suit only on the ground of illegal subletting. The plea of change of user the defendant No.1 being in arrears of rent for more than six months and the defendant No.1 raising permanent structure in the suit accommodation without written consent of the landlord was not found established according to the Trial Court.

Two appeals were preferred which were dismissed. It is, therefore, these revisions.

Learned Counsel for the revisionist in Civil Revision Application No. 950 of 1983 vehemently contended that findings recorded by the two Courts below are inherently incorrect and improper. Adverse inference was drawn against them for non examination of the original landlord. Learned Counsel for the respondent on the other hand contended that the findings have been recorded after considering inherent contradiction in the stand taken by the defendants and also on the basis of report of the Commissioner. Hence, no interference is needed.

From the arguments advanced by learned Counsel for the revisionist in Civil Revision Application No. 950 of 1983, it is clear that these revisionists are not sure whether their status is that of tenants, cotenants or joint tenants. It is not a case where these defendants had inherited tenancy rights from the tenant -in-chief after his death. Consequently the case of co-tenancy is altogether ruled out.

If it is a case of joint tenancy then burden lies on the revisionists to establish that they are joint tenants along with defendant No.1. The case of the respondent landlord on the other hand is that premises was let out only to the defendant No.1. Reference was made to the rent note executed in the year 1961. In this rent note (exh.45) there is clear recital that tenancy was granted to the defendant no.1 alone and not to anyone else. Consequently rent note itself is positive and conclusive. There is no evidence to show that the defendant No.1 alone was not the tenant and that the defendants Nos. 2 to 4 were the joint tenants along with the defendant No.1.

The case of the defendant No.1 is that defendants No. 2 and 3 were permitted to reside as licensee because

the previous house, where they were residing, fell down and on their request they were accommodated on the first floor portion of the disputed accommodation. It was denied that any rent or licence fee was charged by the defendant No.1 from these defendants. The defendants No. 2 and 3 in their first written statement pleaded that they were residing with the defendant No.1 in their capacity as relative and licencee without monetary consideration. Thus, their initial stand was that of licencee but this stand was changed in subsequent written statement filed by them where they have pleaded that they are direct tenants of previous landlord to whom the rent was paid by them and previous landlord accepted them to be the joint tenants. Defendant No.4 on the other hand pleaded that he was joint tenant along with the remaining defendants.

The plea that the defendants No. 2 to 4 were licencees was repelled by the two Courts below for cogent reasons. This is a finding of fact which hardly requires interference in this revision.

So far as the stand of the remaining defendants is concerned; as pointed out earlier; it is changing in nature. If the plea of licence initially raised by the defendants No. 2 and 3 is incapable of belief then their stand of joint tenancy which is a subsequent stand, should be carefully considered.

Onus of proving joint tenancy is on the defendants No. 2 to 4. Initial burden of proof has been discharged by the plaintiff-respondent who from his evidence and rent note proved that the defendant No.1 alone was let out the entire accommodation. The plea of joint tenancy could be established by defendants No. 2 to 4 by cogent and reliable evidence. There is no rent note executed between them and the previous landlord. Rent note exhibit 45 executed in the year 1961 does not contain any mention of these defendants. Other evidence could have been the rent receipt issued by the previous landlord. No rent receipt has been filed by these defendants. On the other hand, attempt was made to file money order coupons through which rent was tendered by one of these defendants viz. defendant No.4. Money order coupons (exhibits 85 and 86) are on record. However, from the admission of the defendant No.4 in the witness box it is clear that these money orders were sent by him for and on behalf of defendant No.1 and the amount was also given by defendant No.1 to him for remittance to the landlord. Consequently these money order coupons do not establish that the defendant No.4 remitted the rent

as joint tenant.

After receipt of notice of demand the defendant No.4 remitted arrears of rent of Rs.20/- by money order which was refused by the landlord. This remittance was not at the rate of Rs.40/- p.m. nor it was accepted. Hence, this remittance also fails to establish the case of joint tenancy set up by the revisionists. The lower Appellate Court has rightly observed that there is no reliable evidence from the defendant No.4 to show that he ever paid rent to the landlord and landlord accepted rent from him as joint tenant. Previous landlord could have been the best witness to establish who was inducted as tenant. He has not been examined. The plaintiff-respondent moved an application for his examination but it was rejected by the Trial Court. No such application was moved by the defendants No. 2 to 4. Non examination of previous landlord was a ground for strong adverse inference against these defendants. Learned Counsel for the revisionist contended that no such adverse inference could be drawn in as much as application of the landlord in that behalf was already rejected by the Trial Court and if another application would have been moved by the revisionist that would also have met the same fate. However, it cannot be said what orders could have been passed by the Trial Court if such application would have been moved by the revisionists. The approach of the landlord for examining previous landlord was to adduce negative evidence that the defendants No. 2 to 4 were not joint tenants. The revisionist could have moved the application stating that the landlord will be the best witness to support their positive stand that they are joint tenants and in that event their application might have been allowed by the Trial Court. However, the fact remains that the previous landlord has not been examined. Even if for a moment adverse inference for non production of the previous landlord is excluded form consideration as already discussed above since there is no reliable oral and documentary evidence to establish joint tenancy of the defendants No. 2 to 4,there is no reason to interfere with the concurrent findings recorded by the two Courts below. Self contradiction in the case of the defendant Nos.2 and 3 that they were licencees and then that they were joint tenants also can be considered to expose hollowness in their defence.

In view of the above discussions, I am of the view that the two Courts below committed no error of law in recording finding that the plea of joint tenancy set -up by defendants No. 2 to 4 was not established.

Coming to the second Revision No.863 of 1983 the suit was decreed only on the ground of illegal subletting made by the defendant No.1 to the defendants No. 2 to 3. Alternative plea was raised in the Courts below that even if there was any illegal subletting the same stands regularised under section 15(2) of the Bombay Rent Act in view of ordinance of 21.5.1959. This alternative plea is also self contradictory. In order to attract the provisions of the said ordinance of 1959, the requirement is that the subtenancy should have been created earlier and the subtenant must have been in possession and should have continued to remain in possession on the date of enforcement of the ordinance. In the instant case, the rent note exhibit 45 reveals that the tenancy itself was created in the year 1961 i.e. after enforcement of the ordinance. Thus even if it is believed for a moment that the defendants No. 2 to 4 were occupying the premises right from the inception of tenancy, their occupation was not established in the year 1959. Hence, the said subtenancy cannot be protected or legalised. This subtenancy also cannot be legalised under section 14 of the Act in as much as section 14 provides for legalisation of subtenancy which was lawful and where the tenancy of the tenant in chief was determined by valid notice such lawful subtenants become direct tenants of the landlord. Thus this section does not help either the defendant No.1 or the defendants No. 2 to 4.

It is true that onus or proving subtenancy lies on the shoulders of the landlord. In order to discharge this onus the landlords are generally faced with the genuine difficulty. The reason is that such contract can hardly be in the knowledge of the landlord nor the landlord is aware of the real terms and conditions of the contract of subtenancy. Still for discharging the initial onus the landlord has to establish two things. Firstly, that the alleged subtenants were transferred exclusive possession either of the whole or portion of the tenanted accommodation. The second requirement is that such transfer of exclusive possession was for valuable consideration.

On the point of transfer of exclusive possession besides oral evidence, from the report of the Commissioner it was found that the articles of these defendants No. 2 to 4 were kept in the first floor portion. Learned Counsel for the revisionist contended that no adverse inference could be drawn against the defendant No.1 on the basis of the report of the Commissioner in as much as the defendant No.1 was not

present when the Commissioner visited the spot. However, no adverse inference had been drawn from the report of the Commissioner by the two Courts below. The report of the Commissioner cannot be ignored because this itself speaks that the son of the defendant No.1 was present at the time of local inspection and other defendants were also present. There is nothing on record to show that objections were filed against the report of the Commissioner and the said report was set aside. Thus, this report also could be considered as substantive evidence by the two Courts below. Thus, exclusive possession of the defendants No. 2 to 4 on the first floor is established.

The case of the defendant No.1 that the defendants No. 2 to 4 were occupying the premises as licenssees has to be ignored because the finding is against the defendant No.1 and this finding has been recorded by the two Courts below upon proper appreciation of evidence on record. The case of joint tenancy set-up by the defendants No. 2 to 4 has also to be excluded for the reasons stated above, so also the plea of licence taken by the defendants 2 and 3 in their earlier written statement.

It is not the case where the defendants No. 2 to 4 are relatives of the defendant No.1. Thus, from the above analysis it transpires that the defendants No. 2 to 4 are mere strangers in the first floor portion of the tenanted accommodation. If the strangers are occupying a portion of the tenanted accommodation it is for the tenant in chief to explain in what capacity the strangers were permitted to occupy. The plea of licence set up by the defendant No.1 has been repelled by the two Courts below. If the strangers were permitted to occupy a portion of the premises then this is a strong circumstance for drawing inference that the transfer of possession was for valuable consideration.

Coming to the second ingredient viz. transfer of possession for valuable consideration, the strangers occupying the premises can be said to have occupied for some monetary consideration. Some indication is to be found from the conduct of the defendant No.4 in this behalf. On receipt of notice of demand he remitted Rs.20/- only as rent to the landlord. As against this on previous two occasions he remitted rent at the rate of Rs.40/- p.m. and that too on behalf of the defendant No.1. He was thus well aware of the fact that the agreed rate of rent was Rs.40/- p.m.. On receipt of demand

notice he did not remit rent at the rate of Rs.40/- p.m. The act of sending money order at the rate of Rs.20/p.m. also gives some intrinsic evidence and circumstance that he was paying Rs.20/p.m. to the tenant in chief.

Thus the landlord succeeded in establishing the two ingredients for establishing the allegation of subtenancy and the two Courts below did not commit any illegality in recording such finding.

In the result the decree for eviction against the tenant in chief as well as the subtenant is in accordance with law. Hence, no interference in this revision is required. These two revisions having no merit are liable to be dismissed and are hereby dismissed. Parties shall bear their own costs.

Sd/-
(D.C.Srivastava, J.)

m.m.bhatt